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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 938

JOHN W. PATTNO, ADMINISTRATOR OF THE ESTATE OF GENE A. LEWIS, DECEASED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court are not reported. The opinion of the Court of Appeals for the Tenth Circuit (Pet. A 1–7) is reported at 311 F. 2d 604.

JURISDICTION

Judgment of the court of appeals was entered on November 19, 1962. A petition for rehearing was denied on December 17, 1962. The petition for a writ of certiorari was filed on March 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly interpreted and applied the Wyoming law of *respondeat superior* in refusing to hold the United States liable under the Federal Tort Claims Act for the acts of a civilian air technician while conducting a training flight under the authority, command and control of the Air National Guard of the State of Wyoming.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article I, Section 8, of the Constitution of the United States provides:

> The Congress shall have Power * * *
>
> * * * * * *
>
> [Clause 16]
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> * * * * * *

Title 32, United States Code, Section 101(6) provides in pertinent part:

> (6) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—
>
> * * * * * *

(B) is trained, and has its officers appointed under the sixteenth clause of section 8, article I, of the Constitution;

* * * * *

Title 32, United States Code, Section 501(b) provides:

(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title.

Title 32, United States Code, Section 709(a) provides:

(a) * * * Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

Title 10, United States Code, Section 8379 provides:

Notwithstanding any other provision of this chapter, the appointment of commissioned officers of the Air National Guard is a function of the governor or other appropriate authority of the jurisdiction concerned.

Air National Guard Regulation 40-02 provides in part:

2. *Scope and Status.* * * * Air National Guard civilian personnel are considered to be

employees of the State, Territory, Puerto Rico, or the District of Columbia, as appropriate. (21 Comptroller General Decision 305).

* * * * *

7. *Responsibilities:*

* * * * *

b. The adjutant general of each State, Territory, Puerto Rico, and the District of Columbia has responsibility for the administration of the civilian personnel program of Air National Guard bases and stations under his jurisdiction. This responsibility will normally be exercised through State Air National Guard staff and allied agencies associated with administrative, technical, and advisory services for the State Air National Guard. The specific responsibilities include:

* * * * *

(3) Administering the local civilian personnel program. To accomplish this the adjutant general is authorized and encouraged to delegate the following administrative functions to the base detachment commander or senior air technician of the separate base or station.

(a) To employ, assign, promote, demote, and separate Air National Guard civilian personnel.

* * * * *

STATEMENT

Petitioner instituted this suit under the Federal Tort Claims Act against the United States in the District Court for the District of Wyoming, seeking to recover damages for the wrongful death of Gene A. Lewis, who, while piloting a private airplane, was killed in a mid-air collision with a jet plane piloted

by Captain William Meckem of the Wyoming National Guard. On December 15, 1959, the day of the accident, Lieutenant Howard T. Anderson was an officer in the Air National Guard of Wyoming, appointed by the Adjutant General of Wyoming by command of the Governor, and assigned by the same command to the 187th Fighter Interceptor Squadron. As a squadron pilot he was required to submit to periodic evaluation of his proficiency. Similarly, Captain William E. Meckem was appointed an officer in the Wyoming National Guard, and was a pilot and flight leader in the same squadron. He, too, was appointed, by command of the Governor, a civilian Flying Training Instructor in the Wyoming Guard, and as such was known as an air technician. The basic authority for his status as a civilian flight training instructor is the so-called "caretaker" statute, 32 U.S.C. 709 (*supra*, p. 3).[1]

At the time of the accident, Captain Meckem was on a flight to evaluate Lieutenant Anderson's pro-

[1] Air technicians are appointed under Air National Guard Regulation 40-02, and are paid with federal funds appropriated for the National Guard. Responsibility for the administration of the civilian air program of the Air National Guard is in the various states. In Wyoming, this responsibility is lodged with the State Adjutant General. He has the authority to employ, assign, promote and separate air technicians; to prescribe rates of pay based upon a required number of duty hours; and to establish duty hours. Captain Meckem was hired as an air technician by the Base Detachment Commander of the Wyoming Air National Guard under authority delegated by the State Adjutant General (Pet. A 4). And as a flying training instructor his duties pertained entirely to flying instruction, and in nowise to the care of property. Air National Guard Manual 40-01 B. 1 (Pet. 5).

ficiency as a fighter pilot (Pet. A 1). Neither officer was in the active military service of the United States at that time, and, as the court below noted, the flight was "autlforized, commanded, and controlled by the Wyoming Air National Guard and not by the United States or any agency thereof" (Pet. A 5). While Captain Meckem was flying the No. 2 position, in close formation as wingman slightly below and to the right of Lieutenant Anderson's lead plane, a private aircraft, owned and operated by Mr. Lewis, suddenly appeared in front of the formation. Lieutenant Anderson saw the private plane in time to take evasive action, but Meckem, whose vision was obstructed by Anderson's plane, collided with the private plane (Pet. A 2).

The trial court found that it was physically impossible for Captain Meckem to see the approach of the Lewis aircraft in sufficient time to avoid the collision because of the position of his aircraft in relation to the lead aircraft; that his chief duties as wingman were those of keeping his aircraft in close proximity to the lead aircraft (R. 16); that both Lieutenant Anderson and Captain Meckem operated their aircraft in a reasonable and careful manner in all respects; and that they were not negligent in the operation of their aircraft (R. 17). The district court further found that Lieutenant Anderson and Captain Meckem, at the time of the accident, were acting under the exclusive control and direction of the State of Wyoming, not the United States. Accordingly, it entered judgment for the government (R. 17).

The court of appeals affirmed. It held that the "fact of employment" was governed by federal law; that in light of the constitutional[2] and statutory[3] provisions assigning to the States responsibility for the appointment and training of National Guard officers, both Lieutenant Anderson and Captain Meckem, as officers in the Wyoming Air National Guard not in active federal service, were state, rather than federal, employees (Pet. A 3); but that Captain Meckem, in his capacity as air technician, appointed under the "caretaker" statute, was an employee of the United States.[4] It further held, however, that at the time of the collision Captain Meckem was acting under the control and in the business of the Wyoming Air National Guard, and therefore—under the Wyoming law of *respondeat superior*, which governed the issue of "scope of employment"—the United States was not liable for his alleged tort (Pet. A 5–A 6). *Williams* v. *United States*, 350 U.S. 857; *Richards* v. *United States*, 369 U.S. 1, affirming 285 F. 2d 521 (C.A. 10).

ARGUMENT

Petitioner's contention is, in effect, that the concurrent decisions below misapply the Wyoming law of *respondeat superior* (Pet. 12–13). This contention is groundless. Moreover, the decision below is not in conflict with any other appellate decision. Finally,

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[2] Art. I, Sec. 8, Cl. 16.

[3] 32 U.S.C. 101(6)B and 501(b); 10 U.S.C. 8379.

[4] We take the position, as we did below, that persons hired pursuant to the "caretaker" statute (32 U.S.C. 709) are employees of the states, and are not employees of the United States.

as we show *infra*, there is an independent ground sustaining the correctness of this decision. Consequently, review by this Court is unwarranted.

1. Under the Federal Tort Claims Act, 28 U.S.C. 1346(b), the United States is liable for the tortious conduct of "any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The fact that the tortfeasor is, as a matter of federal law, an employee of the United States does not preclude him from also being a state employee; nor does it settle whether he was acting within the scope of his *federal* employment at the time of the tort. That question—the "scope of employment" question, and, consequently, whether vicarious liability would be imposed upon a private employer similarly situated—is a matter governed by the *respondeat superior* law of the State where the tort was committed—here Wyoming. *Williams* v. *United States*, 350 U.S. 857; *Richards* v. *United States*, 369 U.S. 1, affirming 285 F. 2d 521 (C.A. 10). Thus, having concluded that Captain Meckem was an employee of the United States, the court of appeals properly turned to Wyoming law to determine whether he was acting within the scope of his federal employment at the time of the collision or whether, instead, he was acting as an employee of the State. It noted that the leading Wyoming case of *Blessing* v. *Pittman*, 70 Wyo. 416, 251 P. 2d 243, established two criteria for determining vicarious lia-

bility in such "dual master" situations: (a) who exercised control over the servant and (b) in whose business was the servant engaged at the time of the accident.[5] Here, the crucial flight was authorized, commanded, and controlled by the Wyoming Air National Guard, and not by the United States or any of its agencies. And it was undertaken as part of a program to train Guard members—a task which the Constitution, as well as federal statutes, assign to the States. Thus, the court of appeals, applying the tests laid down in *Blessing* and other Wyoming cases cited in the opinion, was correct in concluding that liability for Meckem's alleged negligence rested exclusively in the State of Wyoming, not the United States (Pet. A 5–A 6). Both courts below have considerable experience in dealing with questions of Wyoming law, and, under familiar principles, their disposition of such a question should not be disturbed. See *Propper* v. *Clark*, 337 U.S. 472, 486–487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707–708.

2. The decision below is not, as petitioner urges, in conflict with other "caretaker" cases—such as the Tenth Circuit's own decision in *United States* v. *Holly*, 192 F. 2d 221, and the several cases which

[5] These tests are also determinative, we believe, in measuring *respondeat superior* liability under Maryland law. For that reason, we have taken appeals from adverse district court decisions in litigation involving the Maryland Air National Guard arising out of the *Brunswick* accident. Those appeals are now pending in the Court of Appeals for the District of Columbia Circuit, *sub nom. State of Maryland for the use of Meyer* v. *United States*, Nos. 16,953, 16,954 and 16,955, and in the Court of Appeals for the Third Circuit, *sub nom. State of Maryland for the use of Levin* v. *United States*, Nos. 14,041 and 14,042.

followed it.[6] In each of those cases—unlike the present case—the *sole* issue in controversy was whether the negligent caretaker was an employee of the United States. Neither in *Holly*, nor any of its successors, was the "scope of employment" issue expressly raised or considered. In none of the cases did the government contend, as it does here, that the caretaker was acting under the control of the State at the time of the accident, so that under the applicable state law of *respondeat superior* the United States, even though assumed to be the "general employer," would still not be vicariously liable.

3. The decision below can be sustained on an independent ground. The district court found, apart from any question of employment or *respondeat superior*, that, on the facts, both Anderson and Meckem operated their aircraft "in a reasonable and careful manner in all respects" and were not negligent (R. 16). The record fully substantiates this factual determination (R. 64–65, 76–77, 91). Thus, if the court of appeals had reached this question, it would undoubtedly have concluded that the finding of no negligence was supported by the record and not "clearly erroneous" under Rule 52(a), F.R.C.P. Significantly, the court of appeals, though noting that there was no need to discuss the question of negligence, expressly noted that Meckem collided with the private plane because his vision was ob-

[6] *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *Elmo* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5).

structed by the lead plane and that, unlike Anderson, he did not see it in time to take evasive action (Pet. A 2). In sum, even if it be assumed *arguendo* that the alleged tortfeasors' conduct could be imputed to the United States, judgment was still properly entered for the government because there was no actionable negligence.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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